

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RICK CRUZ-MANJARREZ,

04-CV-1811-AS

Plaintiff,

ORDER

v.

CITY OF PORTLAND, OFFICER  
GORE, OFFICER PRESTON, OFFICER  
JONES, OFFICER POOL, OFFICER  
BAXTER, and DETECTIVE  
HALLIBURTON

Defendants.

RICK CRUZ-MANJARREZ  
13787 SW Farmington Rd.  
#178  
Beaverton, OR 97005

Plaintiff, *Pro Se*

LINDA MENG  
City Attorney  
J. SCOTT MOEDE  
Deputy City Attorney  
1221 S.W. Fourth Avenue  
Room 430  
Portland, OR 97204  
(503) 823-4047

Attorneys for Defendants

**BROWN, Judge.**

Magistrate Judge Donald Ashmanskas issued Findings and Recommendation (#70) on October 4, 2006, in which he recommended the Court grant Defendants' Motion for Summary Judgment (#43) and dismiss this matter. Plaintiff filed timely objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also United States v. Bernhardt*, 840 F.2d 1441, 1444 (9<sup>th</sup> Cir. 1988); *McDonnell Douglas Corp. v. Commodore Business Mach., Inc.*, 656 F.2d 1309, 1313 (9<sup>th</sup> Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

This Court has reviewed the pertinent portions of the record *de novo*. Based on the foregoing, the Court adopts that portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court grant Defendants' Motion for Summary Judgment as to claims against Officers Preston, Jones, Pool, and Baxter and Detective Halliburton.<sup>1</sup> The Court also adopts that portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court grant Defendants' Motion

---

<sup>1</sup> The Court dismissed Plaintiff's § 1983 claims against the City of Portland and all of Plaintiff's claims against the Portland Police Department on December 1, 2005.

for Summary Judgment as to Plaintiff's claims against Officer Gore for excessive force, assault and battery, and intentional infliction of emotional distress related to use of the escort grip.

With respect to Plaintiff's claim against Officer Gore for excessive force by use of a police dog during Plaintiff's arrest, the Court notes the Ninth Circuit recently modified the definition of deadly force to be relied on when evaluating excessive-force claims. See *Smith v. City of Hemet*, 394 F.3d 689, 705 (9<sup>th</sup> Cir. 2005).

In *Smith*, the plaintiff alleged the defendants, officers of the City of Hemet police force, used deadly force against him during his arrest by ordering a police dog to attack the plaintiff. *Id.* at 704. The Ninth Circuit reviewed its past decisions on deadly force and modified its definition to include force likely to kill or to result in serious bodily injury. *Id.* at 705. Accordingly, the Ninth Circuit reversed the district court's grant of summary judgment to the defendants on the issue of excessive force, remanded the matter to the district court, and noted:

We need not here determine whether the use of a police dog to subdue a suspect constitutes deadly force generally or the circumstances under which such use might constitute such force. Having announced the definition of "deadly force" we leave to the district court the first opportunity to apply the concept to the facts of this case. We note only that while we have not in any of our

prior cases found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force. *Cf. Robinette v. Barnes*, 854 F.2d 909, 913 (6<sup>th</sup> Cir. 1988) (although failing to find that the police dog in that case constituted deadly force, the court stated that "an officer's intent in using a police dog, or the use of an improperly trained dog, could transform the use of the dog into deadly force"). *Compare Kuha*, 365 F.3d at 598 n. 3 ("[T]he use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force").

*Id.* at 707. The court included the following comment in a footnote after its explanation that it had not found the use of police dogs to constitute deadly force: "Of course, we have heretofore applied the unduly stringent *Vera Cruz* test [that previously set out the definition of deadly force] which we overrule today." *Id.* at 707 n.9.

Although Officer Gore did not raise the issue as to whether the use of a police dog in this case constituted deadly force under *Smith*, Plaintiff raised the issue in his Objections, albeit without citation to *Smith* or any other case. The Magistrate Judge's analysis of Plaintiff's excessive-force claim against Officer Gore and his use of a police dog, therefore, did not include consideration of deadly-force standards under *Smith*.

After a *de novo* review of the pertinent evidence, the Court concludes whether the use of a police dog constitutes the use of deadly force in this case is of sufficient importance in light of the disputed issues of fact related to the use of the dog that

the parties should be given the opportunity to address and to develop that issue before the Magistrate Judge.

In addition, insofar as Plaintiff's claims for assault and battery and intentional infliction of emotional distress against Officer Gore and the City of Portland arise from the use of a police dog and the resulting degree of force, the parties should be given the opportunity to address those claims before the Magistrate Judge.

Moreover, because the events here took place before *Smith*, Officer Gore may be entitled to qualified immunity with respect to Plaintiff's excessive-force claim relating to the use of a police dog. Thus, the issue of qualified immunity may also need to be addressed if the Magistrate Judge finds the use of the police dog constitutes excessive force under *Smith*.

Finally, Plaintiff's claims against the City of Portland under the Eighth and Fourteenth Amendments were dismissed on July 28, 2005. Any other claims brought by Plaintiff against the City of Portland require resolution.

Accordingly, the Court does not adopt that portion of the Findings and Recommendation in which the Magistrate Judge recommended the Court grant Defendants' Motion for Summary Judgment as to Plaintiff's claims against Officer Gore for excessive force related to the use of a police dog and against Officer Gore and the City of Portland for assault and battery and

intentional infliction of emotional distress, but only to the extent these state-law claims arise from the use of the police dog. The Court, therefore, denies Defendants' Motion as to these issues.

#### **CONCLUSION**

In summary, the Court **ADOPTS** that portion of Magistrate Judge Ashmanskas's Findings and Recommendation (#70) in which he recommends the Court grant Defendants' Motion for Summary Judgment (#43) as to all of Plaintiff's claims against Officers Preston, Jones, Pool, and Baxter and Detective Halliburton and **DISMISSES** those claims with prejudice.

The Court also **ADOPTS** that portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court grant Defendants' Motion for Summary Judgment as to Plaintiff's claims against Defendant Gore for excessive force, assault and battery, and intentional infliction of emotional distress related to use of the escort grip and **DISMISSES** those claims with prejudice.

The Court **DOES NOT ADOPT** that portion of the Findings and Recommendation in which the Magistrate Judge recommended the Court grant Defendants' Motion for Summary Judgment as to Plaintiff's claims against Officer Gore for excessive force related to the use of a police dog, and against Officer Gore and

the City of Portland for assault and battery and intentional infliction of emotional distress, but only to the extent these state-law claims arise from the use of the police dog.

IT IS SO ORDERED.

DATED this 12<sup>th</sup> day of January, 2007.

/s/ Anna J. Brown

---

ANNA J. BROWN  
United States District Judge